88-732

No. ———

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HARRY B. HELMSLEY and LEONA A. HELMSLEY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether an order denying a motion to dismiss an indictment for alleged violations of Fed. R. Crim. P. 6(e) may be appealed prior to a final judgment of conviction?

2. Whether a criminal defendant who makes a *prima facie* showing of prejudicial governmental misconduct under this Court's decision in *Bank of Nova Scotia* v. *United States*, 108 S.Ct. 2369 (1988) is entitled to discovery to establish that dismissal of the indictment is warranted?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	
A. Introduction	3
B. Statement of Facts	3
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	12
APPENDIX	
Order of the Court of Appeals	1a
Order of the District Court	3a
Transcript of Hearing before the District Court	4a
Order of the District Court Denying a Stay of the Trial	30a
Order of the Second Circuit Denying a Stay of the Trial	31a

TABLE OF AUTHORITIES

CASES:	Page
Bank of Nova Scotia v. *United States*, 108 S.Ct. 2369 (1988)	i, 11
Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)	7
Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978)	7
In re Grand Jury Investigation, No. M-11-189 (S.D.N.Y. April 14, 1988)	6
United States v. *Benjamin*, 812 F.2d 548 (9th Cir. 1987)	8
United States v. *LaRouche Campaign*, 829 F.2d 250 (1st Cir. 1987)	8
United States v. *Mechanik*, 475 U.S. 66 (1986)	7, 8, 9
United States v. *Midland Asphalt Corporation*, 840 F.2d 1040 (2d Cir.), *cert. granted*, 108 S.Ct. 2869 (1988)	*passim*
United States v. *Taylor*, 798 F.2d 1337 (10th Cir. 1986)	8
CONSTITUTIONAL PROVISIONS:	
United States Constitution, Fifth Amendment	2
STATUTES:	
18 U.S.C. § 3231	4
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1291	2
FEDERAL RULES:	
Federal Rules of Criminal Procedure, Rule 6(e)	*passim*
REGULATIONS:	
28 C.F.R. § 50.2(b)(6)	5
MISCELLANEOUS:	
Model Code of Professional Responsibility, Disciplinary Rule 7-107	5

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Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Harry B. Helmsley and Leona M. Helmsley petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit rendered in this case on September 14, 1988.

OPINIONS BELOW

The order of the court of appeals dismissing petitioners' appeal for lack of jurisdiction (App. 1a) is unreported. The Court of Appeals has not issued an opinion in support of its Order.[1] The order of the district court (App. 2a) is likewise unreported.

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[1] Counsel has filed this petition without awaiting the full time period permitted for filing, and without awaiting the possible filing of the Second Circuit's opinion in that period, in light of the currently scheduled trial date of January 23, 1989 in this matter, and in the hope of being joined for argument before this Court with *United States* v. *Midland Asphalt*, 840 F.2d 1040 (2d Cir.), *cert. granted*,

JURISDICTION

The order of the court of appeals dismissing petitioners' appeal was entered September 14, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides, in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . .

Title 28, section 1291 of the United States Code, provides in relevant part:

> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . .

Rule 6(e) of the Federal Rules of Criminal Procedure provides, in relevant part:

> (2) *General Rule of Secrecy.* A grand juror, an interpreter, a stenographer, an operator of a recording service, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matter occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

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108 S.Ct. 2869 (1988), which counsel has been informed is on this Court's argument calendar for January 17, 1989. Counsel will lodge a copy of the Second Circuit's opinion with the Clerk of this court as soon as it is filed.

STATEMENT OF THE CASE

A. Introduction

Petitioners seek review of a decision of the Second Circuit dismissing, for lack of jurisdiction, petitioners' appeal from the district court's denial of their motion for a hearing into prejudice of the grand jury resulting from violations of Fed. R. Crim. P. 6(e), and for dismissal of the indictment. Petitioners' motion was denied by the trial court notwithstanding that court's finding that the record presented by petitioners indicated that the case was "rife with Rule 6 violations" which had the clear potential for prejudice. (App. 14a).

The issues presented by this appeal are already before this Court on writ of certiorari from the Second Circuit's prior decision in *United States* v. *Midland Asphalt*, 840 F.2d 1040 (2d Cir.), *cert. granted*, 108 S.Ct. 2869 (1988). Petitioners seek certiorari to be joined with *Midland Asphalt*. Petitioners are prepared to meet any expedited briefing schedule the Court may require for this case to be consolidated with *Midland Asphalt*.[2]

At a minimum, this case should be stayed pending the outcome of *Midland Asphalt*. Trial of this matter is currently scheduled to commence on January 23, 1989. Petitioners request for a stay of the trial pending resolution of this petition and *Midland Asphalt* was denied by the district court on September 15, 1988 (App. 30a), and by the Second Circuit on September 23, 1988 (App. 32a).

B. Statement of Facts

On April 14, 1988, a forty-seven count Indictment was filed in the United States District Court for the Southern District of New York against petitioners Harry B. Helmsley and Leona M. Helmsley, as well as their two

[2] Counsel is informed that *Midland Asphalt* has been set for argument on January 17, 1989.

co-defendants, Joseph V. Licari and Frank J. Turco.[3] The charges primarily concern allegations of tax evasion of approximately $1.2 million over a three-year period. The indictment was the product of an investigation conducted jointly by the offices of the New York State Attorney General and the United States Attorney for the Southern District of New York between December 1986 and April 1988.[4] A state indictment charging the defendants with 188 violations of state law, based on the same allegations as the federal indictment, was also unsealed on April 14, 1988.

Petitioners moved before the district court for an inquiry into whether public disclosures and comments in the New York media which were attributed to government sources had prejudiced the grand jury, entitling petitioners to dismissal of the indictment. A steady stream of reports directly citing government sources appeared in the media throughout the more than sixteen months of the grand jury's investigation.[5] These reports, which were submitted to the district court for review, included not only detailed discussions of the nature of evidence presented to the grand jury and the identity of grand jury witnesses, but also attacks on the petitioners' character, accusations of criminal conduct wholly separate from the matters under consideration by the

---

[3] The basis for federal district court jurisdiction in the first instance in 18 U.S.C. § 3231.

[4] State attorneys handling the investigation were appointed as Special Assistant United States Attorneys; federal attorneys were appointed as Special Assistant Attorney Generals for the State of New York.

[5] Most of these reports attributed their information to anonymous "law enforcement sources", "prosecutors", "officials" and "authorities". In several instances, however, individuals in the State Attorney General's Office—a full partner in the federal investigation, and equally bound to ensure against prejudicing the federal grand jurors—were specifically identified by name and quoted at length.

grand jury, purported details of plea discussions between defense counsel and the prosecutors, and pronouncements weeks before the grand jury's vote on the indictment that an indictment would be returned. Petitioners' maintained that the reports were inherently prejudicial in nature, and violated Fed. R. Crim. P. 6 (e), as well as a host of other legal and ethical proscriptions on governmental comments and disclosures concerning an on-going investigation.[6]

As but one example, the following story appeared in the *New York Daily News* on March 29, 1988, two weeks before the grand jury's consideration of the indictment:

> Leona Helmsley, the self-crowned queen of the hotel business, turned down the chance to save her king Harry from possible indictment in a growing federal and state tax-evasion and business fraud investigation, *law enforcement sources said yesterday.*
>
> According to sources familiar with the case, Leona Helmsley, 68, was given the opportunity two months ago to plead guilty to a felony count of business fraud in exchange for immunity for her ailing husband. She refused to deal, sources said, and as a result, prosecutors are considering seeking criminal indictments naming both Helmsleys and two former Helmsley Corp. executives within the next month.
>
> * * *
>
> *Law enforcement sources* said Leona Helmsley's lack of popularity with her employees had led dozens of witnesses to come forward. . . .
>
> "We hardly even had to subpoena people," *one investigator said*, "People were waiting in line to testify against this woman."

---

[6] Petitioners contended that, in addition to Rule 6(e), the public comments and disclosure of information by government personnel concerning an on-going investigation violated, *inter alia*, Justice Department Regulations, 28 C.F.R. § 50.2(b)(6), and the Model Code of Professional Responsibility, DR 7-107.

> *Investigators* said Leona Helmsley's steadfast refusal to admit guilt in the case had only intensified their efforts to prosecute her.
>
> "She's really taken with this queen stuff," *a prosecutor said.* "She thinks she's above the law." (emphasis added).

Moreover, on April 13, and 14, 1988, during the twenty-four hours just prior to the federal grand jurors' vote on an indictment, press reports citing government sources not only revealed that the state grand jury had returned an indictment which was under seal, but also *incorrectly* announced that a federal indictment had also already been returned.

Prior to the return of the indictment, the Helmsleys sought to have the grand jurors polled to determine if they had been prejudiced by the inflammatory publicity, and, if necessary, to have the case reassigned to a grand jury whose impartiality was assured. The Honorable Morris E. Lasker, Jr. emphasized that the Helmsleys' motion "raised a matter of considerable concern", but nevertheless denied the requested relief based upon the conclusion that the Helmsleys could challenge the government's conduct and the propriety of the indictment following the return of the indictment. *In re Grand Jury Investigation*, No. M-11-189, Opinion, (S.D.N.Y. April 14, 1988) (Lasker, J.).

After the indictment, the trial judge of the district court to whom the case was assigned reviewed the record of stories attributed to government sources, acknowledged the highly prejudicial nature of the reports,[7] and con-

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[7] The district court stated that, "putting aside the grand jury for a moment", the government could not "minimize the level of disclosures that have occurred in this case . . . [a]nd the significance of those disclosures in terms of just creating an atmosphere that is clearly counterproductive to these defendants obtaining a fair trial". (App. 14a)

cluded that it appeared the case was "rife with Rule 6 violations". (App. 14a).

Nevertheless, the district court denied petitioners' request that the still-sitting grand jurors be polled to determine if they had been prejudiced by the publicity. (App. 29a).[8] At the same time, the district court denied petitioners' challenge to the indictment on the grounds that petitioners failed to present "persuasive evidence of grand jury prejudice". (App. 27a).

Petitioners filed a timely Notice of Appeal to the United States Court of Appeals for the Second Circuit. Petitioners contended that post-conviction review of their claim of denial of their constitutional right of a fair, unbiased grand jury would be unreviewable after trial under *United States* v. *Mechanik*, 475 U.S. 66 (1986), and that petitioners should therefore be entitled to interlocutory review under the collateral order doctrine.[9] Petitioners also noted that this Court had granted *certiorari* from the Second Circuit's decision in *United States* v. *Midland Asphalt Corporation*, 840 F.2d 1040 (2d Cir.), *cert. granted*, 108 S.Ct. 2869 (1988), in which the Second Circuit held that interlocutory review was not available from the denial of a motion to dismiss an indictment for violations of Rule 6(e).

---

[8] The district court stated:

> We have an indictment . . . and my understanding is that we're going to trial on this indictment as it presently stands. So I'm not going to [poll] the grand jury at this point.
>
> I think the benefit of that . . . procedure is where an indictment is not yet voted, and there is an opportunity to give further instructions to the grand jury. I'm not going to do that at this time.

(App. 29a).

[9] *See, e.g., Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978).

On September 14, 1988, after oral argument, the Second Circuit dismissed the appeal for lack of jurisdiction. (App. 1a).[10]

REASONS FOR GRANTING THE WRIT

In light of the pendency of *Midland Asphalt* before this Court concerning the very same issues presented here, there can be no question as to the "certworthiness" of this petition. The government, by joining in the request for *certiorari* in *Midland Asphalt*, has itself recognized the importance of review by this Court of the issues raised here and in *Midland Asphalt*.[11]

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[10] The Second Circuit's dismissal of the Helmsley's appeal is presumably based solely on adherence to its prior decision in *Midland Asphalt*. The Second Circuit's Order of September 14, 1988 stated only that the appeal was dismissed for lack of jurisdiction, and that an opinion would follow. (App. 2a) Nevertheless, the *Midland Asphalt* rule was the only jurisdictional argument advanced by the government or discussed at oral argument. Moreover, the September 14, 1988 Order was issued on the same day as the oral argument on the appeal, almost immediately following that argument.

[11] Both parties in *Midland Asphalt* noted the multi-way split in the circuits over the availability of interlocutory review of the denial of motions under Rule 6(e). *Compare Midland Asphalt*, 840 F.2d at 1046 (distinguishing the Rule 6(d) violations at issue in *Mechanik* and holding that since an alleged violation of Rule 6(e) "is likely to be appealable following trial if the defendants are convicted, the order is not subject to interlocutory appellate review"); *United States* v. *Benjamin*, 812 F.2d 548 (9th Cir. 1987) (holding that denials of Rule 6(e) motions are immediately appealable since, under *Mechanik*, they are not effectively reviewable post-trial); *United States* v. *Taylor*, 798 F.2d 1337 (10th Cir. 1986) (holding that Rule 6(e) violations which implicate a defendant's right to fundamental fairness in the charging process remain subject to post-conviction review and therefore are not subject to interlocutory review); *United States* v. *LaRouche Campaign*, 829 F.2d 250 (1st Cir. 1987) (post-conviction review generally remains available for grand jury abuses, including violations of Rule 6(e), but even if, under *Mechanik*, post-convictiton relief for violations of Rule 6 is routinely denied, interlocutory review would nevertheless still be foreclosed, because the violations are not sufficiently important to warrant that remedy).

In *Midland Asphalt* the Second Circuit ruled that Rule 6(e) violations occurring during a grand jury investigation are not necessarily rendered harmless by conviction, unlike the Rule 6(d) violation at issue in *Mechanik*. Accordingly, the Second Circuit held that a precondition for the application of the collateral order doctrine was not met:

> "[a]t least in some instances, the more egregious the violation of Rule 6(e), the more *likely* it becomes that a petit jury will convict." Accordingly, we do not believe that *Mechanik* precludes a federal court of appeals from exercising post-trial review of an order denying a motion to dismiss an indictment for violation of Rule 6(e). By the same token, we believe a Rule 6(e) challenge does not qualify for immediate review under the collateral order doctrine.

840 F.2d at 1046 (emphasis in original) (footnote omitted).

Although the Second Circuit emphasized the potential of Rule 6(e) violations to prejudice the *trial jury*, the reference in *Midland Asphalt* to the availability of post-trial review of the motion to *dismiss* the indictment, as opposed solely to a motion for new trial, suggests that the *Midland Asphalt* court believed that an appeal based on the denial of a defendant's right to an unbiased *grand jury* would remain reviewable after trial notwithstanding *Mechanik*. But this Court, when it decides *Midland Asphalt*, may disagree with the Second Circuit and give *Mechanik* a reading broad enough to preclude post-trial review of any issue concerning the impact of Rule 6(e) violations on the decision of the grand jury.

Petitioners' rights will be irretrievably lost if the Second Circuit has not accurately predicted the outcome of this Court's review of *Midland Asphalt*. If this petition is denied and this case proceeds to trial, petitioners may have been denied an appeal prior to trial on the theory that post-trial review is available, only to be denied review later, after conviction, if this Court subsequently overrules *Midland Asphalt* and holds only interlocutory

review to be available. To preclude that obvious prejudice, this petition should be granted, and this case should be consolidated with *Midland Asphalt*.

There is no basis for distinguishing this case from *Midland Asphalt* to suggest that the potential rights and issues at stake here any less significant. To the contrary, the facts in this case are both more egregious in terms of the alleged government misconduct and potential prejudice of the grand jury, and better developed, than in *Midland Asphalt*.

In *Midland Asphalt*, the alleged government misconduct is merely that the government attached defendants' pre-indictment pleadings to public filings in a separate related case. *See United States* v. *Midland Asphalt*, No. 87-1905, Petition for Writ of Certiorari, at 4. Here, petitioners' motion concerned widespread publication of inflammatory reports throughout the course of the grand jury investigation which were attributed to government sources. The allegations raised by petitioners here concern whether grand jurors were prejudiced in being unavoidably exposed, simply by walking the streets of New York, to front page banner headlines vilifying the petitioners and pronouncing that indictments were expected. The governmental misconduct alleged here created the potential that grand jurors, in considering an indictment against the petitioners, acted under the pressure of knowing that the public erroneously believed they had already returned an indictment, and that the press believed that the Helmsleys should be indicted. Thus, this case perhaps more aptly demonstrates the constitutional gravity of Rule 6(e) violations in terms of the threat they pose to the right to an unbiased grand jury.

Moreover, this case presents the Court with a well-developed record on which to delineate the nature of relief available to a defendant who makes a *prima facie* showing of prejudicial governmental misconduct during

a grand jury investigation, regardless of when, or if, appellate review is available. Last Term, this Court stressed that an indictment may be dismissed if government misconduct "substantially influenced the grand jury's decision to indict, or [if] there is 'grave doubt' that the decision to indict was free from the substantial influence" of government misconduct in the grand jury process. *Bank of Nova Scotia* v. *United States*, 108 S.Ct. 2369 (1988). Here, petitioners sought both before and after indictment to have the grand jurors polled to determine if they had been influenced by what the district court acknowledged was inherently prejudicial publicity. Petitioners' pre-indictment request was dismissed as premature, with the district court asserting that a post-indictment challenge was the appropriate procedure. After indictment, the petitioners' renewed request was denied as coming too late, on the grounds that a polling of the grand jury would be appropriate only to prevent prejudice prior to the return of an indictment.

Thus, this case presents the Court with the opportunity to delineate the procedure by which defendants who have made a threshold showing of prejudicial violations can meet *Bank of Nova Scotia*'s standard of demonstrating actual prejudice or "grave doubt" as to the absence of prejudice.

In sum, the record in this case provides the Court with a detailed factual context for deciding once and for all what type of hearing is required to permit proof of *prima facie* violations of Fed.R.Crim.P. 6(e), and when, if ever, appellate review is available.

CONCLUSION

For the foregoing reasons, the writ should be granted.

Respectfully submitted,

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Harry B. Helmsley

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of September, one thousand nine hundred and eighty-eight.

Present:

HONORABLE J. EDWARD LUMBARD,
HONORABLE J. DANIEL MAHONEY,
Circuit Judges,
HONORABLE CON. G. CHOLAKIS,
*District Judge.**

88-1325, -1326

UNITED STATES OF AMERICA,
Appellee,

v.

HARRY B. HELMSLEY, LEONA M. HELMSLEY, JOSEPH V. LICARI, and FRANK J. TURCO,
Defendants,

HARRY B. HELMSLEY and LEONA M. HELMSLEY,
Defendants-Appellants.

[Filed Sept. 14, 1988]

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* Hon. Con. G. Cholakis, District Judge, United States District Court for the Northern District of New York, sitting by designation.

ORDER

Harry B. Helmsley and Leona M. Helmsley appeal from an order entered July 29, 1988 in the United States District Court for the Southern District of New York, John M. Walker, Jr., *Judge*, denying their motion to dismiss the indictment against them on grounds of prejudicial publicity in violation of Rule 6(e) of the Federal Rules of Criminal Procedure. Trial of this matter is scheduled to begin September 26, 1988.

1. Defendants' appeal is dismissed for want of appellate jurisdiction.

2. Mandamus is denied.

3. The mandate shall issue forthwith.

4. A formal opinion shall follow in due course.

FOR THE COURT

/s/ Fred M. Cassidy
Chief Deputy Clerk

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

A TRUE COPY

ELAINE B. GOLDSMITH
Clerk

By /s/ Fred M. Cassidy
Deputy Clerk

Issued as Mandate: September 15, 1988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 88 Cr. 0219 (JMW)

UNITED STATES OF AMERICA

v.

HARRY B. HELMSLEY, LEONA M. HELMSLEY, JOSEPH V. LICARI, and FRANK J. TURCO,
Defendants.

ORDER

Upon consideration of: (1) the Motion of Defendants Harry B. Helmsley and Leona M. Helmsley for a hearing, sanctions and dismissal of the indictment on the ground of prejudicial pre-trial publicity; and (2) their supplemental application for an inquiry into prejudice of the individual grand jurors from such prejudicial publicity, with specific polling of the grand jurors; and having considered the Government's opposition thereto; and having heard oral argument on these applications on July 19, 1988, it is hereby

ORDERED, that said motion and supplemental application be and hereby are DENIED.

Dated: New York, New York
July 29, 1988

/s/ J. M. Walker, Jr.
U.S.D.J.

885/52239.3/1-10

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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88 Crim. 0219 (JMW)

UNITED STATES OF AMERICA

v.

HARRY B. HELMSLEY, LEONA M. HELMSLEY, JOSEPH V. LICARI, and FRANK J. TURCO,
Defendants.

July 19, 1988
2:30 p.m.

Before:

HON. JOHN M. WALKER, JR.,
District Judge

APPEARANCES

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United States Attorney for the
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Attorney for Joseph V. [Licari]

MARILYN GO,
Attorney for Frank J. Turco

[2] (In open court)

THE COURT: I take it that there is one motion here as to which the parties are aware, there is a sealed ex-parte affidavit from Mr. DeVito. And as to that particular application, that pertains to a matter, independent investigation, or potentially under investigation by a grand jury. So I will take that up in a sealed proceeding with a sealed transcript, and I'll clear the courtroom when we take up that matter.

Now, that leaves with us the Count 47 motion and the pretrial publicity motion to be taken care of in open court.

I'll hear the defendants on the pretrial publicity motion at this time.

MR. WING: May it please the court, Judge, we submit that Harry and Leona Helmsley have as much right as any other defendant or any other citizen to have their case submitted to a fair, impartial and unbiased grand jury.

And we believe based on the cases set forth in our papers, that is the way the Supreme Court has interpreted the constitutional right to have a case presented to a grand jury.

[3] In this case, the defendants are seeking a hearing and sanctions and dismissal of the indictment on the ground that the pretrial prejudicial publicity to a large degree disseminated by law enforcement sources, has denied that very basic constitutional right to these defendants.

Now, the publicity which we attached to the motion papers, Judge, I should say is by no means the only publicity in this case. But we believe that it is a fair—

THE COURT: The problem is though that the publicity that you've attached is not necessarily the result entirely of the activity of the government, or of the state Attorney General's office.

MR. WING: What we submitted, Judge, were articles where, for the most part, there were statements in there in which the reporter attributed information to law enforcement sources, law enforcement investigators, prosecutors. In several instances quoting directly from a, not one but two of the State Attorney General representatives who were making comments about various aspects of this case.

And it is that information, we submit—we're not saying that necessarily everything in the articles attached, emanated from the government, we don't know short of a hearing, but I think we can accept the fact that the reporters writing this material would not inaccurately [4] attribute information to law enforcement sources.

THE COURT: I think it is fair to draw the conclusion that when the reporter says it's derived from law enforcement sources, it is.

MR. WING: We agree.

THE COURT: Because that enhances the credibility of his article. There is no showing that these reporters were mislead on that score.

MR. WING: And we think that, if you look through the exhibits that are attached to Mr. Bruton's affidavit, one after another reflects improper statements by different officials about this case. And these were statements, many of which wind up in articles that are given great prominence in New York's most colorful newspaper, the New York Post.

There was a reporter there, I gather, who was writing not just for the New York Post, but is planning to publish a book on this case, and the Helmsleys, and therefore, had an interest in combing every detail he could and reporting every detail he could.

And a lot of the material that comes out is clearly inflammatory. And if your Honor were presiding over a trial, in no way would you permit some lawyer or anyone to put that kind of evidence in front of the jury that's deciding guilt or innocence of a defendant.

[5] Now, I understand the grand jury is different from a petty jury—

THE COURT: There is no—it's not clear in this case, that the grand jury read these articles. In fact, my understanding is that they were instructed not to.

MR. WING: Well, your Honor,—

THE COURT: So it's not quite the same.

MR. WING: It isn't clear that they read them, Judge, but it doesn't clear by any means that they didn't read them.

There was an effort made by counsel for the defendants prior to indictment to achieve a remedy which I think would have cured the problem.

They went to Judge Lasker, they asked for a hearing, and they specifically asked jurors be polled.

THE COURT: What you are basically saying is that the atmosphere was so pervaded by the publicity involved in this situation, that we have to presume prejudice. That's basically what you are saying.

MR. WING: That's part of what I'm saying, judge. I think it's fair to say that given the number of articles and the amount of material that's very damning attributed to law enforcement sources, it's the kind of thing that would catch the eye, particularly the pre-indictment weeks in front of the indictment that there [6] would be an indictment and it would have many charges.

We are also saying that where there is a showing on the face of the press articles that it was the government that was responsible for the press articles.

The defendants have every right to inquire into that and to see whether in fact what appears on the face of these articles is true, and the extent to which information was siphened to reporters by various government representatives.

And in that eventuality, if the court so finds that that was being done in violation of 6E, and local rule seven and the bar association standards, and all of the other rules and regulations which govern prosecutors prosecut-

ing in this courthouse, that there should be sanctions taken. And that one of the sanctions should be dismissal of the indictment, not just as a punishment but as a reflection of the fact that this kind of publicity really is unfair.

And I think the person who probably expressed it the best was Judge Franklin years ago in the Swuey case when he said you can do so much, and the grand jury is permitted to hear that is—isn't under the rules of evidence, but there comes a time that you cross the line, and if the government is out they are reading information to the press, and that information comes back to the grand jury, that's [7] unfair and not—it should not be done.

Now, the government says, gee wiz, if you dismiss indictments based on prejudicial publicity no notorious or well-known person could ever be prosecuted. That's baloney.

We're not asking that no one be indicted. All we're asking for is a fair grand jury. And there is no reason at all in this case why in the first instance the jury couldn't have been polled prior to the indictment, or given the stage we're at, why another grand jury couldn't easily hear the evidence in an atmosphere that is purged of this kind of poisonness publicity. And perhaps a grand jury instructed by a judge in advance to make sure that they were not in some way prejudiced by what had gone before. That's all we're saying.

Mr. DeVito comes back and he says that he has made an inquiry and that he has determined based on his inquiry that none of the people who he knew to be directly involved in the investigation were responsible for, or were the source of the information in the press.

THE COURT: He's gone a step further and he said that the Office of Professional Responsibility at the Department of Justice is looking into the matter.

MR. WING: Judge, with due respect, that's like appointing the chief fox to see who broke into the chicken

[8] coop. Although we welcome any investigation by anybody—

THE COURT: I don't think that he necessarily presumed that that office would act irresponsibly when requested to investigate something like that.

MR. WING: All I can say is there have been many instances in the past, some in the recent past, of allegations of improper leaks from a variety of prosecution officers. And we have yet to hear of the results of the sanctions against anyone in law enforcement.

THE COURT: I think you got a point.

You mentioned that one of the sanctions was dismissal. What other levels of sanctions are there?

MR. WING: Well, you can hold in contempt the people responsible for leaking this information.

THE COURT: You can also refer the matter to the bar association.

MR. WING: That's correct. And with respect, Judge, to that particular point, the government would like us essentially to defer everything until after the trial.

I am concerned about that for two reasons. One, it is the ultimate Catch 22. Before indictment we're told you can't interfere with the grand jury process so wait until after indictment. After indictment we're told, you can't interfere with the trial so wait until after the trial. After the trial we're told by the Supreme Court in [9] The Bank of Nova Scotia you are too late. So you have nothing.

THE COURT: In terms of your clients, as far as the prosecution is concerned, granted the remedies may not be what you would like, but the fact of the matter is that what you are seeking here are sanctions against the government for actions. And in a situation where there is—where right now there is presumptively regularity of grand jury proceedings, and in addition to that, we have statements by the prosecutor that the grand

jury was informed not to pay attention to the press to proceed on the evidence that was presented to them.

MR. WING: Your Honor, two points, one with respect to the timing of this. We believe that if we had a hearing and we learned before there was a trial that prosecutor X was the one who was doing the leaking, we would make every effort we could to have prosecutor X recused from the case where we had a trial.

Number two, I respectfully submit that the instructions given by the prosecutor, by Mr. DeVito, as recounted in his affidavit, were anything but sufficient. And they would not be found sufficient by this court if this court had this problem in connection with the trial of the case.

There would be an individual voir dire of the [10] jurors, did you see the offending article. That's normally what happens in trials. And the reason is the same, the reason is to make sure you are getting people who are not influenced in the decision they are being asked to make by something they shouldn't be influenced by.

I should point out that the decision by Judge Sifton, the former chief appellate attorney in this office, in the Southern District in the Biaggi case is a hallmark of how you do it.

In that case, the prosecutors represented that they had given the same instructions to the grand jury they were dealing with, that they shouldn't consider the press, that they shouldn't read the press.

Judge Sifton polled those jurors himself. He determined as reported in his opinion which is attached to our papers, he determined that some of the jurors had read, had been exposed to some of the media material. And he further determined that despite that, they would not be able to unfairly—they would not be able to—they would be able to fairly judge the case and they could put out of their minds whatever there was.

I think that's the way it should work, that's the way it should have worked here. Unfortunately the applica-

tion was made to Judge Lasker I believe on April 13. There was a—maybe it was April 11th, but there was a God [11] awful rush to get this indictment done, not for any reason relating to the merits of the case but because they had scheduled press conferences, they had to have the conference on the 14th because they had to have the opportunity of warning the western world that tax evasion was a bad thing.

I don't think that's a legitimate purpose to deny defendants to fair grand jurors.

THE COURT: I thought Mr. Feffer was going to put a stop to that practice when he was in the Justice Department.

MR. WING: Judge, he said you were going to put a stop to it.

MR. FEFFER: I did, your Honor, for two years.

MR. WING: I want to point out one other thing, Judge, and that is with all good faith to Mr. DeVito, the statements in his affidavit are very carefully drawn. I don't think they really cover the problem.

We do not know who, if anyone, ever talked to the press about anything.

I suspect that in making a representation to Mr. DeVito that he wasn't the source of the news articles, that people like Mr. Giuliani or Mr. Abrams didn't take the time to sit down and go through all the news articles to even know enough about what they were saying.

Maybe he can answer it when he responds.

[12] I also think that the fact you got these press articles, and not just one or two or a handful, many, many press articles quoting primarily investigators but some occasions prosecutors, he says no one was the source of the information. But the material we attached to our papers names two people from the state, Fashelle is one, I think Ryan is the other, they're quoted by the Post, as talking about—one was talking about the shredding. The other fellow was talking about how they are expanding the investigation to go into all sorts of other things where

there was possible frauds involvement, all sorts of inflammatory prejudicial improper remarks by named people. Mr. DeVito's affidavit doesn't say word one about how that jibes with his general statement, gee, nobody here was the source of the information.

And he's also very careful to limit the reputations to those people—

THE COURT: Let's assume for the moment that Mr. DeVito was unable to, and had whatever investigation he conducted, uncover the fact that one or more prosecutors or investigators were the source of the information.

Not ascribing any bad faith to Mr. DeVito, just that he wasn't able to uncover that, and he's making a representation based on what he believes to be the case, but [13] maybe he's wrong, let's assume that maybe he's wrong, under those circumstances where are you with respect to the motion to dismiss?

MR. WING: I'm here in court asking for a hearing so we can go further than Mr. DeVito did. And I think the results of the hearing would warrant dismissal.

THE COURT: I want to hear Mr. DeVito.

MR. WING: Could I just say ont further thing, your Honor?

THE COURT: Yes.

MR. WING: I just want to point out one thing. At a hearing shortly after the indictment, following a particularly egregious article in the press in which a law enforcement source is quoted as describing the Helmsleys as people who were gouging from their employees.

This report appears in a New York Times article April 22, it's Exhibit S to Mr. Bruton's affidavit.

There was a hearing before Judge Bradley over in state court, and after the hearing Mr. DeVito, talking privately with Mr. Feffer, indicated that he had heard something indicating that whatever the source of the leaks were, it wasn't from his office, it was from the state. It was from a state office not necessarily the Attorney General's office.

I think, that doesn't appear in his affidavit, [14] but I think there is no question that there were government officials involved in these leaks, and that the statements were improper.

The COURT: Well, I don't see how you can erect in this case where the investigation clearly joined a Chinese wall between the federal government and the state.

It may be that everybody who was sworn in as an AUSA acted appropriately or Deputy Special Assistant U.S. Attorney, who happend to be—who is a state—officer of the State Attorney General's office, but also was detailed to this case, made improper disclosures to me. It's the same thing, as if someone in Mr. Giuliani's office has done it.

MR. WING: I agree with the court.

The COURT: And that should be and presumably in the subject of the investigation that Mr. DeVito reported is under way by the Justice Department.

MR. WING: I inquired before coming to court today about the status of that investigation from Mr. DeVito. And all he advised me was who was in charge of it. He was able to give me further information.

I suspect that whatever the results are we will never know them.

THE COURT: I wouldn't be too sure of that. Because what I'm thinking of in this case, is that this [15] court be provided with a report from the Office of Professional Responsibility, as to the results of that investigation detailing the steps that were taken, who was interviewed, how the investigation was conducted, and finally the conclusions of it. So this court is apprised of the results of that investigation.

Mr. DeVito has asked that this court rely, place reliance on the fact that he has ordered such an investigation. And I'm faced at the same time with your request for sanctions.

Now, it seems to me the two go hand in glove, that I would have to consider the results of any such investigation in determining your motion for sanctions.

I'm talking about sanctions that would be applied on a personal basis, as against the various people who violated ethical or local standards in leaking information.

MR. WING: The only thing that concerns me, Judge, about limiting the defendants' remedy to that, is that we're in a box, we obviously can't go question grand jurors about what they read or what impact it had on them. We think that in the absence of our ability to do that, and in the presence of all of this horrendous press, there is a presumption that the defendants were prejudiced, which at the very least should have been explored prior to indictment when defense counsel went to Judge Lasker. It wasn't, [16] because of that, we respectfully submit, the defendants ought to have a fair and open-minded grand jury. And the way to do that is to dismiss this indictment.

It in no way precludes the government from reindicting, and in most cases these days there are three or four superceding indictments.

I realize from Mr. DeVito that he doesn't presently contemplate a superceding indictment, so I only say in reference to his comments and Mr. Giuliani's comments that they may relate to the spirit rather than the manner in which sensitive things are dealt with.

THE COURT: Let me hear Mr. DeVito.

Mr. DeVito, I don't think, first of all, that you can stand up and minimize the level of disclosures that occurred in this case. And the significance of those disclosures in terms of just creating an atmosphere that is clearly counterproductive to these defendants obtaining a fair trial. And putting aside the grand jury for the moment.

MR. DeVITO: Your Honor, it is—

THE COURT: It appears to me that this case was rife with Rule 6 violations.

MR. DeVITO: Your Honor, let me start out by clarifying something that Mr. Wing said toward the end of his presentation, so that it is not weighing on the court in [17] any event, because your Honor correctly pointed out that if someone involved in this investigation leaked the information, it doesn't matter whether it was a Special Assistant U.S. Attorney or an Assistant U.S. Attorney in our office.

THE COURT: I'm glad I agree with you on that.

MR. DeVITO: What I said to Mr. Feffer was in the nature of explaining that I had heard a rumor that it was an agency completely uninvolved in this investigation who may have leaked some information immediately prior to the indictment. That it was not the Attorney General's office, and it was not the U.S. Attorney's office. I passed that information, frankly—

THE COURT: How could they have been unrelated to this investigation? Just hypothetically. They either were privy to the grand jury material or they weren't. And if they weren't privy, then someone leaked it to them.

MR. DeVITO: Your Honor, I can't answer how that agency may or may not have come by the information in the course of their performance of whatever the function is.

I can saw that it was the rumor that I heard was—it was someone other than the two prosecuting officers and the investigators assigned to this invesetigation.

THE COURT: Mr. DeVito, you know the IRS under [18] rule I think it's 6103, is forbidden from turning out—from producing taxpayer information or releasing taxpayer information, it's a felony to do that. And it is the obligation of the U.S. Attorney's office to investigate felonies. Federal felonies. By whomever committed it.

And under those circumstances it's the obligation of the U.S. Attorney's office, it seems to me, to investigate such cases anyway wholly independent of whether there is a prosecution.

MR. DeVITO: I couldn't agree more. That's exactly what's going on.

Moreover, I would point out if you look at the publicity that the defendants are pointing to in that week, you have predictions that an indictment will be forthcoming or that indictments will be forthcoming, you have some description of what might be charged in or—was in a state indictment about which the defendants' attorneys were informed four days before it became public.

There you have a potential for filtering through the Helmsley organization and publication from that end of it as to what the charges will be in the state indictment.

And then you have a erroneous statement that there is a federal indictment.

None of that is tax information. And none of it is—or certainly the part about the federal indictment is [19] completely inaccurate.

So what I'm submitting, your Honor, is that there are good reasons to believe that those forces, those offices and investigators, the prosecuting officers and investigators who were directly involved in putting those two indictments before the grand jury, filing them, were not the source of the leaks because they knew what each other was doing.

Now, before we even get to the issue of who struck John, your Honor, and I do not intend in any way to minimize the significance of the fact that there appeared to be leaks—appeared to have been leaks, and those will be investigated, and I just want to, before I even move on to the applicable legal standards, Mr. Wing is inaccurate when he says that you never hear any results of these investigations. Because if you look at the results in the ABSCAM case, the Myers case, in the Eastern District related to massive, massive disclosures of wire—recorded statements and videotape contacts involving the defendants, all kinds of material that it was conceded came from the government. And the government conducted an investigation, and a U.S. Attorney and a Chief

Deputy U.S. Attorney were sanctioned by the Department of Justice in connection with that case.

An FBI agent resigned prior to completion of the [20] government's investigation in that case.

So to say that there is no history of the government taking active steps to correct this kind of wrongdoing is simply not fair.

The issues in this case, your Honor, however, relate to the relief that these defendants are seeking. And it really breaks down into two separate categories.

First they ask for dismissal of the indictment. And secondly, they ask for unspecified sanctions apparently in the nature of contempt, according to what Mr. Wing has said here.

Now, I want to address the first part of that first.

The inappropriateness of the remedy of dismissal. The Supreme Court just three weeks ago in Bank of Nova Scotia held that the court does not have authority to dismiss an indictment simply to punish the government. That only if there is actual prejudice to the defendants can there be such a dismissal.

Now, in the Myers case, which was in the Eastern District, Judge Michelle, I believe it was, and in the Burke case, which was a Second Circuit case, which specifically approved Myers, both courts said that the defendants before they are even entitled to a hearing, have a heavy burden of showing some form of actual prejudice.

[21] In the Burke case there was a huge article in Sports illustrated purportedly written by the government's chief witness in that case prior to the indicement, and prior to the trial. And the court held that you cannot presume from the fact of prejudicial or publicity indicating wrongdoing, that there was a prejudice to the defendant before the grand jury. That there has to be some showing.

And it's not the same. The cases make it absolutely clear that the considerations are very different when

you're talking about arguable prejudice in a grand jury as compared to a petty or trial jury. Because of course the trial jury decides guilt or innocence beyond a reasonable doubt.

And when you have that potential final step, you don't have a back stop. Whereas, and this is the Burke case that points this out, this is a First Circuit case quoted in Myers, when you're talking about the considerations that differentiate between what may be prejudice before a grand jury as opposed to a trial jury, with a grand jury, you have a subsequent trial jury which has the final say of guilt or innocence, or—guilt or not guilty, so the considerations are different. You clearly do not apply the same presumptions when you're talking about publicity potentially affecting a petty jury and a grand jury, you cannot equate the two.

[22] And the cases, there are dozens of cases, the Mandel case from the District of Maryland, and the Fourth Circuit, the United States against Mitchell, in this District, which I point out, your Honor, in Mitchell, Judge Gilliardi held that the prosecutor's statements that he had given instructions to the grand jury were entitled to heavy weight. It was entitled to that type of consideration which, I submit, is entitled to my affidavit in this case.

The final point, your Honor, in talking about the inappropriateness of dismissal as a remedy here is the type of information that we're talking about.

There is simply not the type of information that wts published here attributed to the government that the prejudice in the same sense that disclosing wiretap conversations, or disclosing the contents of recorded videotape meetings as you had in the ABSCAM case.

Here the publicity says—talks about the number of witnesses who were before the grand jury. Of course, the grand jury knows how many witnesses were called before it.

It talks about the length of time the investigation has been going on, and the difficulty in obtaining documents, all of which the grand jury is fully aware of.

And it certainly, after a year of investigation, came as no surprise to this grand jury, even assuming they [23] read in the newspaper that they were going to be asked to vote an indictment, that hardly was a surprising or prejudicial fact to the grand jury.

I'm not condoning any leak of that information by a government official, if it took place. I am saying that there has simply been no showing in this case of prejudice. And the defendants have a heavy burden in order to obtain a dismissal of the indictment here.

Now, I'd like to address the second potential—second part of Mr. Wing's request, and underlying his request for a hearing, is the suggestion that the defendants and the defense attorneys would be the appropriate parties to present a case to the court, to sanction individuals in this case, individual government officials.

And think about that for a moment, your Honor.

What they are in a sense asking is that they be appointed special prosecutors, the representatives of the defendants in this case who are being paid fees to further the interest, properly so, further the interest of the defendants should be the parties who come before this court representing the public interest to punish the wrongdoers on the government's side.

And I submit to you, your Honor, that would be an improper and impermissible conflict of interests.

I think it's similar to the case that the Supreme [24] Court decided last year, Young versus ex rel Veton, where the court held that you could not appoint the private attorney of a—

THE COURT: Let me just stop you right there.

If the grand jury, an arm of the court, and if there are improprieties in connection with the way the government is handling the grand jury, it seems to me as

night follows day that it's appropriate for the court to apply sanctions.

MR. DeVITO: Absolutely. I don't dispute that in the slightest.

I would submit that the proper way for the court to proceed is just as your Honor has suggested, await the outcome of the investigation being conducted jointly by our office and the Office of Professional Responsibility, review that the determine at that stage what sanctions may or may not be appropriate.

What I suggest is completely improper, is for these attorneys, hired to represent defendants before this court, should take up the mantle of the public interest and may—be charged with investigating and presented evidence of individual government attorney or investigator wrongdoing. It's completely inappropriate. They cannot wear both those hats. It would be a total and complete conflict of interest.

[25] THE COURT: All right.

MR. WING: To the extent it's a conflict for us, Judge, I submit it's equally, a conflict for them, I do hope Mr. DeVito is being paid for whatever he's doing, I suspect he's doing.

MR. DEVITO. Your Honor, I'm not investigating myself.

THE COURT: Mr. DeVito, let me hear Mr. Wing. Are you finished?

Mr. DEVITO: Well, I hadn't quite, Your Honor.

THE COURT: I'm sorry, go ahead.

MR. DEVITO: I just wanted to add to the court, to finish by saying that there are two Assistant U.S. Attorneys from the Southern District of New York who had no involvement in this case, have been assigned to the investigation. And there is an attorney from the Office of Professional Responsibility who is assigned to participate jointly. And I have every confidence that they will do their utmost to determine what if any wrongdoing has been committed by government officials in con-

nection with this case. And if and when that is shown, I completely agree with the court, that sanctions should be applied.

THE COURT: All right, Mr. Wing.

MR. WING: Judge, on the investigations by the government of government leaks, I thing it is fair to point [26] out that Mr. Morganthau, the U.S. Attorney's office, and the Department of Justice, Office of Professional Responsibility, purportedly undertook these investigations in April right after the indictments were filed. It's now three months later.

THE COURT: Sometimes investigations take a long time. I don't think you can necessarily hold that against them.

MR. WING: True. But I gather the course of such an investigation one of the things that would happen would be inquiry made of defense lawyers.

As far as I know, no one has asked any defense lawyer involved in this case a single question about anything.

But beyond that, Judge, and I should also point out that Mr. DeVito has stated in state court that the state investigators would have no jurisdiction or authority to investigate what he did. Or what the federal people did, because they would not have jurisdiction.

I don't know whether it works the other way or not, whether the state people can say they don't come under the aegis—

THE COURT: You may have to resign from private practice, Mr. Wing, in order to be a prosecutor again. But I have to say that under the circumstances I have no basis [27] for concluding that there is anything improper or that these investigations are not going forward.

And my intention is to direct that the results of the investigation be furnished to the court for appropriate action.

MR. WING: Judge, I have no quarrel with that. As I say, we don't quarrel with that, we think that in

addition to that it would be helpful, as it is in many cases where there is fact finding to be done and factual issues in dispute, to have the benefit of cross-examination from an adverse party. And that's what we are and that's what we would do.

With respect to the cases Mr. DeVito refers to, the Bank of Nova Scotia, I respectfully submit was not a case where conceivably was any prejudice to the grand jury or could have been, there was an indication where the violations were disseminating information to the IRS—

THE COURT: —I can see that you feel that it's not—can't draw a distinction, but the statements of law would appear to require a showing of actual prejudice.

MR. WING: I think they do require a showing of prejudice. And frankly I think that supports us. I think we are arguing here that there is prejudice. We are arguing here that we would like the right to further explore the issues so that we could show prejudice, show more prejudice [28] than we can just with a news articles.

The fact of the matter is, as I say, we are not able to go in and question grand jurors. We would be in deep trouble if we even thought about it.

But under the circumstances here, where we did ask to have a judge do that, and where the judge denied that request and said this was something that would be taken up after indictment if there were an indictment, we have no remedy, we are totally boxed.

And, your Honor, I think that somehow the process doesn't permit a defendant to be in a position where just assume for the sake of argument that each and every grand juror who voted this indictment did so because they read and were influenced by comments of the State Attorney General about shredding a claim that was made in banner headlines, a claim which has nothing to do with this case and was totally unfounded in any event.

That wouldn't be fair. That wouldn't comport with anyone's concept of what's due process.

And Mr. DeVito did say there is a big difference between trial and being indicted. To a person who is indicted, being indicted is a fairly serious thing to say. To the extent there is a back stop with a petty jury, I don't think you can honestly say we should have to go to the back stop, that there is no relief for the defendant when [29] this kind of thing takes place, when jurors are prejudiced and when the cause, whether inattention or unintentionally is government officials.

And I think that's really what we're dealing with here.

The Myers case referred to by Mr. DeVito may be wrong, but my memory is that people got sanctions in that case, people in the U.S. Attorney's office in New Jersey. And as I recall sanctions related to their basically siding with defense lawyers who were claiming that their clients had been prejudiced by press.

My memory isn't that sharp, I don't recall it that well, but I do recall that after the trials had gone down there were lengthy post trial hearings conducted and that was the result.

The Burke case, you're talking about one article in Sports Illustrated. It was a government witness but it wasn't the government. The government didn't send him out there to give an interview with Sports Illustrated.

I know there is not something—the basic principles, I respectfully submit if you think about them, require what we ask.

THE COURT: All right. I'm going to rule on this matter.

On June 17, 1988 the defendants, Harry B. [30] Helmsley and Leona M. Helmsley moved for an order of this court requiring an inquiry into allegedly unlawful government disclosures concerning this case, and for dismissal of the indictment on the grounds that the government allegedly disclosed information about this case in violation of Federal Rules Criminal Procedure 6(e) and

other applicable regulations and statutes governing disclosure of confidential information and by federal governments.

Specifically, the Helmsleys allege that the government officials made "repeated public comments about the case." They cite various news reports in which they allege that, "Law enforcement sources", "investigators", and the like, are quoted as "disclosing among other things the nature of evidence presented to the state in federal grand juries, and the nature of papers and proceedings under seal in both the state and federal courts".

Defendants also urge as improper Assistant United States Attorney DeVito's statement in court that a grand jury might be asked to further investigate whether the Helmsleys made personal use of corporate resources in moving for dismissal of the indictment.

"Defendants urge this court, in effect, to send a signal that the government cannot gain an advantage in high profile cases where pattern of prejudicial leaks and [31] comments".

Now, the government has responded that there have been few, if any, government leaks in the case, and that the defendants themselves may be to blame for some of the leaks.

To the extent that there have been, "isolated indiscretions by 'government sources' ", and I'm referring to the government's memorandum in opposition for that, "the government asserts that those indiscretions will be investigated by the Department of Justice, Office of Professional Responsibility and the U.S. Attorneys Office for the Southern District of New York."

Further the government argues that defendants have not shown that the grand jury's decision to indict was substantially influenced by unauthorized disclosures as is required by Bank of Nova Scotia v. United States, recent Supreme Court decision that can be found at 56 U.S. Law Week 4714.

It's a decision dated June 27, 1988.

While the court must always be concerned that a criminal defendant's rights are scrupulously regarded by the government at all stages of the prosecution, and that the government obey the strictures of Rule 6(e), and other applicable rules and statutes in the circumstances of this case we conclude that the defendants have presented no [32] persuasive evidence of government conduct that caused actual prejudice in accordance with the standards as set forth in Bank of Nova Scotia case.

Therefore the defendants motion for sanctions—the sanction of dismissal of the indictment is denied.

The motion for an order for an inquiry by the court and a hearing into the alleged unauthorized governmental disclosures is denied in the face of the government's statement that there is the ungoing investigation of the Office of Professional Responsibility and the U.S. Attorney's office.

However, the government is directing the government to furnish the court with a complete report of that investigation, that will include the detailing the scope of the investigation and the findings and conclusions of that investigation, so that the court may determine whether appropriate sanctions, further appropriate sanctions are necessary.

Now, let me just say that in the Bank of Nova Scotia, which was decided last month, the Supreme Court held that, "A District Court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants". The court stated that where dismissal is sought for nonconstitutional error dismissal is appropriate "only if it is established that the violation [33] substantially influenced the grand jurors' decision to indict, or if there is grave doubt that the decision to indict was free from the substantial influence of such violations."

And that is quoted at page 4716.

Now, in that regard the Supreme Court quoted United States ags. Mechanik, 475 U.S. 66 at page 78, (1986) decision.

Further the Supreme Court noted the impropriety of dismissing the indictment based on "postindictment violations which were unrelated to the grand jury's independent and decisionmaking process because the alleged violations occurred after the indictment".

The Supreme Court concluded by noting that, "errors of the kind alleged in these cases can be remedied adequately by means other than dismissal, such as contempt of court or an order to show cause by the prosecutor or other law enforcement officers should not be disciplined by the bar or the Department of Justice or chastisement in a written opinion".

As the court reasoned, such remedies allow the court to focus on a culpable individual rather than granting a windfall to the unprejudiced defendant.

In this case the defendants have offered no evidence that any violations of Rule 6(e) either [34] substantially influenced the grand jury's decision or that there is grave doubt whether the decision to indict was free from such substantial influence.

Indeed, the government maintains that the grand jury was repeatedly instructed to disregard any press reports involving the investigation.

Defendants ask the court in effect to presume prejudice from any unauthorized disclosure as Bank of Nova Scotia that makes clear or prejudice is not to be presumed except in the rare instances which are inapplicable in days where, for example, a defendant can show race or gender bias discrimination in the selection of grand jurors. [sic]

Even under prevailing law in this circuit prior to the decision in Bank of Nova Scotia the defendants would not have been entitled to the dismissal of the indictment nor even a hearing on this case. In U.S. Ags. Burke, 700 F.2d 70, a Second Circuit decision in 1983, for example,

the Court of Appeals adddessed a convicted defendant's contention that a trial judge should have granted a request for a hearing to determine whether an allegedly prejudiced magazine article interfered with the grand jurors inability to be impartial to consider whether to vote an indictment.

The Court of Appeals stating that the defendant must, "Bear the heavy burden that he has suffered as a result of the publicity," opinion at page 82, concluded that [35] the defendant failed to cite any persuasive evidence of actual grand jury prejudice in the preindictment criminal action.

Here the record is devoid of persuasive evidence of grand jury prejudice.

As noted above, mere speculation and surmise are not sufficient to warrant conferring a, "windfall on the unprejudiced defendant" in accord—I'm quoting there Bank of Nova Scotia.

Therefore, the court does deny the motion for dismissal of the indictment.

The court also denies defendants motion for order requiring a hearing into the alleged unauthorized governmental disclosures.

The court credits Assistant United States Attorney's DeVito's averments that an inquiry into an unauthorized governmental disclosures has been commenced by the Office of the United States Attorney and the Office of Professional Responsibility of the United States Department of Justice, and that two Assistant United States attorneys from the Attorney General's office and one Department of Justice attorney are currently conducting that investigation wholly independently of this case.

Now, while it is best, indeed required, that the government conduct itself in such a way that such inquiries [36] are not required, given that the government has now determined that an inquiry is necessary and has instituted such an inquiry, the court is satisfied that this inquiry, at least in the first instance, until the court

receives a on copy of the report, is sufficient to address the defendants' concern.

I note that in Bank of Nova Scotia one of the remedies that is suggested by the court is that the court could request either the bar or the Department of Justice to initiate appropriate disciplinary proceedings.

In light of that admonition of the Supreme Court, I am satisfied that the inquiry currently under way meets that particular suggestion in substance.

Accordingly the defendants' motion for a hearing by this court at this time is denied.

Let me say parenthetically that the defendants' contention that United States Attorney Giuliani's comments at the time of the filing of the indictment, or the unsealing of the indictment, together with any statements made by Mr. DeVito concerning this case in subsequent proceedings, is not relevant to the determinations as to whether there was any prejudice in the return of the indictment since these occurred after the indictment had been filed.

However, I am deciding that the government is [37] directed to furnish the court with a complete report of the investigation detailing the scope of the investigation, the findings and its conclusions.

MR. WING: Could your Honor set a date for the conclusion of that, or the receipt of that report, so that we might have a chance to seek recusal, if necessary, of any attorney found to be in violation?

THE COURT: I am going to ask that the government furnish me with a status report as to the anticipated completion of the investigation.

I'm not asking you to do it, Mr. DeVito, yourself, but I'm asking one of the attorneys who is working on that case to furnish the court with a status report as to the—

MR. DEVITO: I'll convey that message, your Honor.

THE COURT: I am not going to set a deadline.

MR. WING: In view of your Honor's ruling, I would like to ask your Honor to consider, not necessarily to be

decided this minute, but at least consider whether the court would be willing to inquire of the grand jurors, who I understand are still sitting, with respect to the issues we raised in this motion, to see whether the answers they might give you in response to the poll done by Judge Sifton, might urge your Honor to reverse your ruling in this case.

[38] THE COURT: We have an indictment, it is not a situation where we have a grand jury that is going away, we have an indictment, and my understanding is that we're going to trial on this indictment as it presently stands. So I'm not going to pole the grand jury at this point.

I think that the benefit of that would be where that procedure is where an indictment is not yet been voted, and there is an opportunity to give further instructions to the grand jury. I'm not going to do that at this time.

Now, with respect to Count 47, I would like to hear the defendants on that.

MR. BRUTON: Yes, there are actually three related problems, and three related motions, they all deal with the problem of—posed by Count 47. And I'll just enumerate the ones on the table. If your Honor would like me to take them separately I will, or if your Honor would like to to take them separately I will, or if you prefer to take them together since they are all related.

THE COURT: Why don't you just list the problems that you see and we can discuss them.

MR. BRUTON: The first motion is a claim for—a request for severance of Count 47 because it's misjoined under Rule 88 of the Federal Rules of Criminal Procedure.

There are additional questions whether Rule 14 also applies, and whether it is prejudiical. But the main question is a question of misjoinder.

* * * *

[Remainder of Transcript Omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

88 Cr. 0219 (JMW)

UNITED STATES OF AMERICA

v.

HARRY B. HELMSLEY, LEONA M. HELMSLEY, JOSEPH V. LICARI, and FRANK J. TURCO,
Defendants.

ORDER

An application for a stay of this case has been filed by defendants Harry Helmsley and Leona Helmsley ("defendants"). Defendants assert that the Court should grant a stay on the ground that they intend to file a petition in the United States Supreme Court for a writ of certiorari to the United States Court of Appeals for the Second Circuit based on the Second Circuit's Order of September 14, 1988, dismissing defendants' appeal from this Court's Order denying defendants' Motion For An Inquiry Into Governmental Leaks And Publicity, And For Sanctions.

Defendants' application for such stay is hereby DENIED.

/s/ John M. Walker, Jr.
United States District Judge

Dated: New York, New York
September 15, 1988

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

88-1325 & 88-1326

UNITED STATES OF AMERICA,
Appellee,

v.

HARRY B. HELMSLEY, LEONA A. HELMSLEY,
Defendant-Appellants.

[Filed Sep. 16, 1988]

NOTICE OF MOTION FOR EMERGENCY MOTION FOR STAY OF TRIAL PENDING PETITION FOR CERTIORARI AND/OR RECALL OF MANDATE

MOTION BY:

Gerald A. Feffer
Williams & Connolly
839 17th St., N.W.
Washington, D.C. 20006 (202) 331-5000

OPPOSING COUNSEL:

James R. DeVita
Assistant U.S. Attorney
Southern District of New York
One St. Andrew's Plaza
New York, New York 10007 (212) 791-1997

Has consent of opposing counsel:

A. been sought? ☒ Yes ☐ No

B. been obtained? ☐ Yes ☒ No

Has service been effected? ☒ Yes ☐ No

Is oral argument desired? ☒ Yes ☐ No
(Substantive motions only)

Requested return date: Sept. 19, 1988
(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? ☐ Yes ☐ No

B. by firm date of argument notice? ☐ Yes ☐ No

C. If Yes, enter date:

Argued September 14, 1988

Judge or agency whose order is being appealed:

Hon. John M. Walker, Jr.

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☒ Yes ☐ No
(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? ☐ Yes ☒ No

If No, explain why not:

Appeal already heard

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

Brief statement of the relief requested:

A 30-day stay of trial pending filing of a petition for writ of certiorari, and, upon filing, an automatic extension of that stay pending final disposition by the Supreme Court. Cf. Fed. R. App. P. 41(b). Trial is scheduled to begin September 26, 1988,

Complete Page 2 of This Form

By: *(Signature of attorney)*

/s/ Gerald A. Feffer
Signed name must be printed beneath
GERALD A. FEFFER

Appearing for: *(Name of Party)*

Harry B. Helmsley
Leona A. Helmsley
Date—9/16/88

Appellant or Petitioner:

☐ Plaintiff ☒ Defendant

Appellee or Respondent:

☐ Plaintiff ☐ Defendant

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is denied

/s/ J. Edward Lumbard (CJ)

/s/ J. Daniel Mahoney

/s/ Con. G. Cholakis (DJ)

09-23-88

[Page 2]

Previous requests for similar relief and disposition:

None.

Statement of the issue(s) presented by this motion:

Whether this Court should stay defendants' trial, scheduled to begin in ten (10) days, pending petition for writ of certiorari, where the Supreme Court has already granted cert. on the precise question at issue.

Brief statement of the facts (with page references to the moving papers):

Although it acknowledged the large volume of improper government publicity (mem. at 7 n.5), the district court denied defendants' motion to poll grand jurors and to dismiss defendants' indictments because of the government's violations of Rule 6(e). (Aff. ¶ 4). This Court, apparently following *United States* v. *Midland Asphalt Corp.*, 840 F.2d 1040 (2d Cir. 1988), *cert. granted*, 56 U.S.L.W. 3875 (June 27, 1988), held that the denial of such motions are not immediately appealable. (Aff. ¶ 5). *Midland Asphalt* is due to be argued in the Supreme Court in January of 1989. (Aff. ¶ 6).

Summary of the argument (with page references to the moving papers):

This Court's adherence to the rule in *Midland Asphalt*, while it is pending in the Supreme Court, threatens to leave defendants with no possibility of appellate review of their right to have the evidence considered by an impartial and unbiased grand jury. Under *Midland Asphalt*, denials of motions to dismiss indictments for Rule 6(e) violations are not immediately appealable. (Mem. 7). The Supreme Court's review of *Midland Asphalt*, in light of *United States* v. *Mechanik*, 475 U.S. 66 (1986), may well result in such claims being reviewable *only* pretrial. Absent a stay, however, defendants will already

have been tried and thus will have been completely denied appellate review of their claims. (*Id.*) Accordingly, this Court should stay defendants' trial, scheduled to begin in ten (10) days, pending defendants' petition for writ of certiorari.

(2)

Supreme Court, U.S.
FILED
JAN 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-732

In the Supreme Court of the United States

OCTOBER TERM, 1988

HARRY B. HELMSLEY AND
LEONA A. HELMSLEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
WILLIAM S. ROSE, JR.
Assistant Attorney General
ROBERT E. LINDSAY
GAIL BRODFUEHRER
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Department of Justice
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8 pp

QUESTIONS PRESENTED

1. Whether an order denying a motion to dismiss an indictment for alleged violations of Fed. R. Crim. P. 6(e) may be immediately appealed, prior to the entry of a final judgment of conviction and sentence, under the collateral order doctrine.

2. Whether petitioners were entitled to discovery to determine whether they were prejudiced by the alleged Rule 6(e) violations.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	3
Conclusion	5

TABLE OF AUTHORITIES

Cases:

Bank of Nova Scotia v. *United States*, No. 87-578 (June 22, 1988) 3

Midland Asphalt Corp. v. *United States*, cert. granted, No. 87-1905 (June 27, 1988) 3, 5

United States v. *Midland Asphalt Corp.*, 840 F.2d 1040 (2d Cir. 1988) 3

Statutes and rule:

18 U.S.C. 371 2

18 U.S.C. 1341 2

18 U.S.C. 1951 2

26 U.S.C. 7201 2

26 U.S.C. 7206(1) 2

26 U.S.C. 7206(2) 2

Fed. R. Crim. P. 6(e) 2, 3, 4

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-732

HARRY B. HELMSLEY AND
LEONA A. HELMSLEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The order of the court of appeals dismissing petitioners' appeal for lack of jurisdiction (Pet. App. 1a-2a) is unreported. The court of appeals has not yet issued an opinion in support of its order. The order of the district court (Pet. App. 3a) is unreported.

JURISDICTION

The order of the court of appeals was entered on September 14, 1988. The petition for a writ of certiorari was filed on November 1, 1988. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Harry B. Helmsley is the President and sole shareholder of Helmsley Enterprises, Inc. Petitioner Leona A. Helmsley is the President of Helmsley Hotels, Inc., a wholly owned subsidiary of Helmsley Enterprises. On April 14, 1988, a federal grand jury in the Southern District of New York returned a 47-count indictment against petitioners, together with co-defendants Joseph V. Licari and Frank J. Turco. The indictment charged the defendants with conspiracy to commit offenses against the United States and to defraud the United States and the Internal Revenue Service, in violation of 18 U.S.C. 371; willfully attempting to evade and defeat taxes, in violation of 26 U.S.C. 7201; aiding and abetting petitioners in their attempts to evade personal income taxes, in violation of 26 U.S.C. 7201; willfully making and subscribing false individual tax returns (Forms 1040), in violation of 26 U.S.C. 7206(1); willfully aiding and assisting in the preparation and presentation of false individual, corporate, and partnership tax returns, in violation of 26 U.S.C. 7206(2); mail fraud, in violation of 18 U.S.C. 1341; and extortion, in violation of 18 U.S.C. 1951. See Indictment at 1; Gov't C.A. Br. 1-2.

On June 17, 1988, petitioners moved to dismiss the indictment. They contended that the government had violated Fed. R. Crim. P. 6(e) by publicly disclosing details of the grand jury investigation. In support of their motion, petitioners cited numerous newspaper articles that appeared before, during, and after the investigation, in which information was occasionally attributed to government sources. Petitioners also requested a hearing to determine whether the grand jurors had been exposed to, or influenced by, the publicity.

On July 19, 1988, following a hearing, the district court denied petitioners' motion to dismiss the indictment (Pet. App. 4a-29a). Although the court agreed that the case "was rife with Rule 6 violations" (*id.* at 14a), it concluded (*id.* at 25a) that petitioners had failed to present "persuasive evidence of government conduct that caused actual prejudice," as required by this Court's decision in *Bank of Nova Scotia* v. *United States,* No. 87-578 (June 22, 1988). The court explained (Pet. App. 26a) that petitioners had "offered no evidence that any violations of Rule 6(e) either substantially influenced the grand jury's decision or that there is grave doubt whether the decision to indict was free from such substantial influence." The court also denied petitioners' request to poll the grand jurors to determine whether they had been prejudiced by the publicity about the case (*id.* at 28a-29a).

2. The court of appeals dismissed petitioners' appeal for want of appellate jurisdiction (Pet. App. 2a). In its order dismissing the appeal, the court indicated that it would file a formal opinion "in due course" (*ibid.*). As of the date of this filing, the court of appeals has not yet issued an opinion.

ARGUMENT

1. The court of appeals dismissed petitioners' appeal for want of appellate jurisdiction, apparently in reliance on its earlier decision in *United States* v. *Midland Asphalt Corporation,* 840 F.2d 1040 (2d Cir. 1988). This Court has granted a petition for a writ of certiorari in *Midland Asphalt,* No. 87-1905 (June 27, 1988), and the case is presently scheduled for oral argument on January 17, 1989. For the reasons set out in our brief in *Midland Asphalt,*[1] we believe that the court of appeals correctly

[1] A copy of the government's brief in *Midland Asphalt* has been furnished to petitioners.

dismissed petitioners' appeal. We agree with petitioners, however, that the first question presented in the petition—whether the denial of a Rule 6(e) motion to dismiss is immediately appealable under the collateral order doctrine—is the same question presented to this Court in the *Midland Asphalt* case. We therefore agree with petitioners that the first question in this case should be disposed of in light of the Court's decision in *Midland Asphalt*.[2]

2. Petitioners also ask the Court (Pet. 10-11) to decide what, if any, procedures are available to a defendant who seeks to show that a grand jury was unduly influenced by Rule 6(e) disclosures. That question is simply not presented in this case. In light of its disposition of the jurisdictional issue, the court of appeals did not address petitioners' discovery request. In any event, petitioners offer no support for the claim that they were entitled to a hearing or to discovery on the issue of grand jury prejudice. They argue (Pet. 10) that the Court should prescribe standards to govern discovery for defendants who have made "a *prima facie* showing of prejudicial governmental misconduct" during a grand jury investigation. As the district court concluded (Pet. App. 25a-26a), however, petitioners adduced no evidence—let alone made "a *prima facie* showing"—that the grand jury's decision was affected by pretrial publicity. Further review of this issue is therefore unwarranted.

---

[2] There is no reason, however, to accept petitioners' request (Pet. 3) that plenary review be granted in this case and that the case be consolidated for argument with *Midland Asphalt*. Even if this case otherwise merited such treatment, *Midland Asphalt* has already been fully briefed and is scheduled for argument on January 17, 1989. Consolidating this case with *Midland Asphalt* would not serve the purpose of presenting the appealability issue any better than it is presented in *Midland Asphalt*, and it would cause a long delay in the disposition of that case.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of this Court's decision in *Midland Asphalt Corporation* v. *United States,* cert. granted, No. 87-1905 (June 27, 1988).

Respectfully submitted.

CHARLES FRIED
Solicitor General
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Assistant Attorney General
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Attorneys

JANUARY 1989

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No. 88-732

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HARRY B. HELMSLEY AND LEONA M. HELMSLEY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY BRIEF FOR PETITIONERS

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TABLE OF AUTHORITIES

CASES: Page

Abney v. United States, 431 U.S. 651 (1977) 5
Helstoski v. Meanor, 442 U.S. 500 (1979) 5
Midland Asphalt Corp. v. United States, No. 87-1905 ..... 3,4, 5, 6
United States v. Mechanik, 475 U.S. 66 (1986) 4
F.R.Crim.P. Rule 6(e) 3, 4, 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-732

HARRY B. HELMSLEY AND LEONA M. HELMSLEY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY BRIEF FOR PETITIONERS

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1. On January 20, 1989, the United States Court of Appeals for the Second Circuit issued an opinion supporting its September 14, 1988 order dismissing this appeal for want of jurisdiction and denying mandamus. The decision of the court of appeals is set out hereafter at Appendix 1a-8a.[1] The court of appeals reasoned that

> [b]ecause a Rule 6(e) violation is not necessarily rendered harmless by a subsequent conviction, in which event it would be subject to post trial review, a ruling on such an asserted violation "does not qualify for immediate review under the collateral order doctrine."

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[1] "App." references are to the Appendix to this Brief. "Pet. App." references are to the Appendix to the Petition for a Writ of Certiorari filed in this case.

App. 4a-5a, quoting *United States v. Midland Asphalt Corp.*, 840 F.2d 1040, 1046 (2d Cir. 1988), *cert. pending*, No. 87-1905 argued January 17, 1989. The court of appeals noted that "[a] serious violation" of Rule 6(e) may deprive a defendant of a fair determination of guilt or innocence and that "[s]uch an impact may be reviewed after trial, alleviating any need for interlocutory appeal." App. 4a-5a. As a result, the court held that this case is not "within the limited class of exceptions to the rule of finality in criminal cases which have been accorded judicial recognition" and concluded that it "would not be justified in creating a further exception." App. 6a-7a.

The court emphasized that its dismissal of this interlocutory appeal "should not be considered condonation of any prosecutorial misconduct that may have occurred," and noted that the Department of Justice is investigating grand jury leaks that the district court found "rife." App. 7a.[2] It endorsed the district court's order that it be furnished with a complete report on the Department's investigation. The court of appeals, therefore, affirmed the district court's denial of petitioners' reqeust for a hearing on the allegations of prosecutorial misconduct on the ground that the prosecutors' misconduct could be the subject of a renewed motion at the conclusion of the investigation. *Ibid.* In addition, it denied petitioner's request that the application be treated as an application for mandamus, because it had already determined that "post-

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[2] The court of appeals referred to "Judge Lasker's statement, in his endorsement order denying pre-indictment relief . . . that '[l]eaks of pending indictments have become so commonplace as to make a mockery of the secrecy provisions of the grand jury,' and Judge Walker's comment, during the hearing on the motion whose denial is the subject of this appeal, that 'it appears to me that this case was rife with Rule 6 violations.'" App. 7a, n.4. The court pointed out that at least some information about the grand jury was disclosed by identified state authorities associated with the joint state and federal investigating team. It is also noted that "[n]umerous other press reports were attributed to anonymous law enforcement sources." *Ibid.*

trial review is available to remedy any prejudice defendants-appellants may suffer. . . ." App. 8a.

2. The government has agreed (Br. 4) with petitioners that the appealability issue in this case is the same one now before the Court in *Midland Asphalt*. It therefore concludes that the Petition for a Writ of Certiorari should be held and disposed of in light of the Court's forthcoming decision in *Midland Asphalt*. *Ibid.* But the government opposes petitioners' request (Br. 4, n.2) that this case be consolidated for consideration with *Midland Asphalt* contending that it would add little to the Court's resolution of *Midland Asphalt* and would delay disposition of that case.

3. Notwithstanding that oral argument has been held in *Midland Asphalt*, consolidating this case with *Midland Asphalt* or granting independent review, would provide the Court with a more complete understanding of the practical and recurring procedural problems raised by violations of F.R.Crim.P. 6(e) than will consideration of *Midland Asphalt* alone. As the government itself has strenuously argued,[3] *Midland Asphalt* involves only a technical violation of Rule 6(e)—indeed a violation that the government contends was precipitated by the *Midland* petitioners/defendants—a far cry from this case, which the district court below concluded is "rife with Rule 6 violations" that created "an atmosphere that is clearly counterproductive to these defendants obtaining a fair trial." App. 14a. The violations involve disclosures of allegations being considered by the grand jury, information heralding rumors of grand jury actions in advance of grand jury deliberations, and *ad hominem* attacks on petitioners by government personnel. These inflammatory disclosures were widely published often with attribution to unnamed government personnel in the

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[3] *See* Brief for the United States, *Midland Asphalt Corp., et al. v. United States*, No. 87-1905 at pp. 32-33.

New York tabloid press. Such abuse nullifies petitioners' constitutional right to indictment by an independent, unbiased grand jury.

4. The Fifth Amendment provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . .

In *Midland Asphalt*, the government, relying on *United States v. Mechanik*, 475 U.S. 66 (1986), has argued [4] that conviction by a petit jury always renders harmless misconduct or error in the grand jury's charging process.[5] But although technical breaches of Rule 6(e) such as the one arguably involved in *Midland Asphalt*, can be harmless, some grand jury irregularities—those that deprive a putative defendant of the right to consideration by independent, unbiased grand jurors—can never be rendered harmless by a conviction. For example, if the government skips the indictment process and charges a defendant by felony information, a conviction certainly cannot cure such a glaring violation of the Fifth Amendment. Indeed, an order denying a motion to dismiss prior to trial would surely be final and immediately appealable for the reasons interlocutory appeals were per-

---

[4] *See* Brief for the United States, *Midland Asphalt Corp., et al. v. United States*, No. 87-1905 at pp. 20-22, 37-38.

[5] In *Midland Asphalt*, the government suggested that exceptional grand jury violations can be reviewed by the courts of appeals on petition for a writ of mandamus. *See* Brief for the United States, *Midland Asphalt Corp., et al. v. United States*, No. 87-1905 at p. 37 & n.26. In this case, a writ of mandamus was sought as an alternatvie to appeal but was denied by the court of appeals. This case, therefore, also places squarely before the Court the mandamus question not present in *Midland Asphalt* but suggested by the government as a possible alternative.

mitted in *Abney v. United States*, 431 U.S. 651 (1977) and *Helstoski v. Meanor*, 442 U.S. 500 (1979). It must follow that substantial deprivation of the right to an indictment by a grand jury would be subject to immediate appeal even if this Court were to conclude that violations of the type present in *Midland Asphalt* are not. The problem, of course, is identifying those errors which risk nullification of the grand jury clause. This case, much more than *Midland Asphalt* offers the Court an opportunity to consider the circumstances under which a violation of Rule 6(e) would result in effective deprivation of the right to indictment by a grand jury.

5. Surprisingly, the government also contends that the second question presented by the Petition—to what kind of inquiry into the extent of prejudice is the defendant entitled—is "not presented in this case." Br. 4. Yet it is beyond dispute that petitioners made a substantial showing of Rule 6(e) violations by the government and inflammatory disclosures that found their way into publications with widespread circulation. This showing resulted in the district court's conclusion that the grand jury process was "rife with Rule 6 violations." App. 14a. In the face of this evidence, it is surely reasonable to infer that these disclosures came to the attention of and influenced, the grand jurors who considered the indictment. But the court nevertheless denied petitioners' requests, both before and after indictment, to poll the grand jurors or to pursue further factual inquiry into information exclusively within the government's dominion and control.[6] This case, therefore, squarely presents the discovery issue—may a trial court deny petitioners' motion to dismiss because of failure to prove prejudice while at the same time depriving them

---

[6] F.R.Crim.P. 6(e)(3)(C)(ii) provides for disclosure of grand jury information to a defendant "upon a showing that grounds may exist to dismiss the indictment because of matters occurring before the grand jury." The rule recognizes that defendants are entitled to disclosure of information necessary to make out or disprove a claim of grand jury abuse.

of a fair opportunity consistent with Rule 6 to establish prejudice. Again, this is an issue of recurring importance that is simply not presented in *Midland Asphalt*.

6. Although *Midland Asphalt* has already been argued, it would be possible to consolidate this case with it to permit the Court to consider more broadly the recurring and important issues requiring this Court's attention. To this end, petitioners remain willing to meet any expedited briefing schedule. In the alternative, if consolidation at this stage is considered inappropriate, we request that the Petition for a Writ of Certiorari be granted independently to resolve the additional and compelling issues presented in this case.

CONCLUSION

For the reasons stated here and in the Petition, the Petition for a Writ of Certiorari should be granted and this case consolidated for disposition with *Midland Asphalt v. United States*, or set for independent disposition.

Respectfully submitted,

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Date: January, 1989

* Counsel of Record

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 297, 298

AUGUST TERM, 1988

Argued: September 14, 1988

Decided: September 14, 1988

Opinion: January 20, 1989

Docket Nos. 88-1325, 88-1326

UNITED STATES OF AMERICA,
Appellee,

-v.-

HARRY B. HELMSLEY, LEONA M. HELMSLEY,
JOSEPH V. LICARI and FRANK J. TURCO,
Defendants,

HARRY B. HELMSLEY and LEONA M. HELMSLEY,
Defendants-Appellants.

Before:

LUMBARD and MAHONEY,
Circuit Judges,

and CHOLAKIS,
*District Judge.**

---

* The Hon. Con. G. Cholakis, United States District Judge for the Northern District of New York, sitting by designation.

Appeal from an order of the United States District Court for the Southern District of New York (John M. Walker, Jr., *Judge*) denying defendants-appellants' motion to dismiss the indictment or, in the alternative, to grant a hearing to determine the effect of publicity upon the action of the grand jury.

Appeal dismissed for want of appellate jurisdiction; mandamus denied.

JOHN R. WING, New York, New York, (Harris J. Yale, Weil, Gotshal & Manges, New York, New York, of counsel for Defendant-Appellant Harry B. Helmsley; Gerald A. Feffer, James A. Bruton, III, Eva M. Petko, Williams & Connolly, Washington, D.C., of counsel for Defendant-Appellant Leona M. Helmsley, *for Defendants-Appellants Harry B. Helmsley and Leona M. Helmsley.*

JAMES R. DEVITA, Assistant United States Attorney for the Southern District of New York, New York, New York (Rudolph W. Giuliani, United States Attorney for the Southern District of New York, Cathy Seibel, Celia Goldwag Barenholtz, Assistant United States Attorneys for the Southern District of New York, New York, New York, of counsel), *for Appellee.*

CHOLAKIS, *District Judge*:

On April 14, 1988, a grand jury in the Southern District of New York handed up an indictment charging Harry B. and Leona M. Helmsley, as well as Joseph V. Licari and Frank J. Turco, in 47 counts with tax evasion, false tax returns, mail fraud, extortion and conspiracy in violation of 26 U.S.C. §§ 7201 (1982) and 7206(1) and (2) (1982), and 18 U.S.C. §§ 2 (1982), 371 (1982), 1341 (1982) and 1951 (1982). Due to the Helmsleys' prominence, a great deal of media attention focused upon the grand jury's investigation during the period leading up to the indictment. As a result of the publicity, defendants Harry and Leona Helmsley filed a

motion seeking dismissal of the indictment or, in the alternative, a hearing into the effect of this publicity upon the grand jury considering this case. They alleged that the government was responsible for leaking information to the press concerning matters occurring before the grand jury in violation of Fed. R. Crim. P. 6(e)(2).

District Judge John M. Walker, Jr. denied their motion by order entered July 29, 1981,[1] and the Helmsleys brought this appeal. Based upon an upcoming trial date of September 26, 1988, the government moved for expedited consideration of the appeal. This motion was granted on August 1, 1988, and oral argument was heard in this matter on September 14, 1988. In their reply brief on appeal, the Helmsleys requested that if this court determined that an interlocutory appeal was unwarranted, the court treat this appeal as a petition for a writ of mandamus. An order was issued on September 14, 1988 dismissing the appeal for want of appellate jurisdiction and denying mandamus. This opinion sets forth our reasons.

Defendants-appellants maintain that, as a sanction against the government for its improper actions in disseminating grand jury information concerning this case, the indictment against them should be dismissed. They further contend that they are entitled to a hearing or, at a minimum, to a polling of the grand jury to determine the actual extent of the prejudice caused by the newspaper articles.

The first issue to be addressed is the appealability of Judge Walker's order. Defendants-appellants maintain that they are entitled to interlocutory review of Judge

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[1] A previous motion seeking, *inter alia*, an evidentiary hearing concerning prosecutorial leaks of grand jury matters to the press and termination of the grand jury proceedings against the Helmsleys was denied by Judge Morris B. Lasker in an endorsement order just prior to the filing of the indictment.

Walker's decision because, if the court refuses to review that determination, their right to an unbiased grand jury will be irretrievably lost, since the propriety of the grand jury indictment is not reviewable after conviction. They further contend that the issue has been conclusively decided and is separate from the merits of the action.

The government contends in opposition that intelocutory appeal is not the appropriate vehicle for review of the denial of defendants-appellants' motion to dismiss pursuant to Fed. R. Crim. P. 6(e). The government maintains that defendants-appellants may appeal the denial of that motion upon completion of any trial in this matter, but only at that juncture.

The general rule is that appeal may be taken to a court of appeals only from "final decisions of the district courts." 28 U.S.C. § 1291 (1982). A collateral order, however, is reviewable by means of interlocutory appeal if 1) it conclusively determines the disputed question; 2) it resolves an important issue completely separate from the merits of the action; and 3) it is effectively unreviewable on appeal from a final judgment. *United States v. Midland Asphalt Corp.*, 840 F.2d 1040, 1042 (2d Cir.) (citing *Coopers and Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)), *cert. granted*, 108 S. Ct. 2869 (1988). In examining the appealability of a ruling with respect to asserted violations of Fed. R. Crim. P. 6(e), this court, after full consideration of the collateral order rule, has specifically held that such orders are not subject to interlocutory appeal. *Midland Asphalt*, 840 F.2d at 1046. The role of Rule 6(e) in the grand jury system is to protect society's interest in the secrecy of the grand jury. Because a Rule 6(e) violation is not necessarily rendered harmless by a subsequent conviction, in which event it would be subject to post-trial review, a ruling on such an asserted violation "does not qualify for

immediate review under the collateral order doctrine." *Id.*

The Helmsleys argue that the decision in *Midland Asphalt* is inconsistent with the Supreme Court's decision in *United States v. Mechanik*, 475 U.S. 66 (1986). In *Mechanik*, the Court reviewed a violation of Fed. R. Crim. P. 6(d), which prohibits anyone other than the person testifying, attorneys for the government, interpreters when needed and a stenographer from being present while the grand jury is in session. The Supreme Court determined that any error in allowing two agents of the Drug Enforcement Administration to testify in tandem before the grand jury was rendered harmless by a subsequent conviction. *Id.* at 70.

In *Midland Asphalt*, however, this court considered the Supreme Court's reasoning in *Mechanik*, and distinguished that decision from the case before it. The decision in *Mechanik* rested upon a Rule 6(d) violation, which only affects the charging of a defendant and does not go to guilt or innocence. *Mechanik* held that a subsequent conviction more than supports a finding of probable cause to charge, thereby precluding any post-trial challenge under Rule 6(d). *Mechanik*, 475 U.S. at 70;[2] *see Lopez v. Riley*, No. 88-2305, slip op. (2d Cir. Jan. 3, 1989) (applying *Mechanik* in habeas corpus proceeding under 28 U.S.C. § 2254 (1982)). A serious violation of Rule 6(e), on the other hand, may have the effect of depriving a defendant of a fair determination of guilt or innocence. Such an impact may be reviewed after

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[2] More recently, the Supreme Court made clear that a *pre-conviction* challenge may be made on the ground that errors in grand jury proceedings affected the decision to indict. *Bank of Nova Scotia v. United States*, 108 S. Ct. 2369 (1988). Since the motion to dismiss the indictment was granted by the district court in *Nova Scotia*, that case does not address the appealability of a denial of such a motion.

trial, alleviating any need for interlocutory appeal. *See Midland Asphalt*, 840 F.2d at 1046.

Defendants-appellants also contend that the decision in *Midland Asphalt* has been seriously undermined by this court's subsequent decision in *United States v. Friedman*, 854 F.2d 535 (2d Cir. 1988), a case dealing with alleged Rule 6(e) violations in the context of an appeal from final judgments of conviction. In *Friedman*, however, the defendants failed to show that any violations of Rule 6(e) which might have occurred[3] had any effect upon the petit jury and defendants' conviction. *Id.* at 584. Thus, the court ruled that any error which might have occurred was harmless, and upheld the district court's decision denying a motion to dismiss. *Id.* at 583-84. The court cited its earlier decision in *Midland Asphalt* as not barring a Rule 6(e) challenge when the resultant prejudice has an effect upon the determination of guilt or innocence. *Id.* at 583.

We therefore adhere to the holding of *Midland Asphalt* that interlocutory appeal is not available from pre-trial rulings on such questions. As we stated in *Midland Asphalt*:

> [A]dherence to the rule of finality is particularly important in criminal cases, "because 'the delays and disruptions attendant upon intermediate appeal,' which the rule is designed to avoid, 'are especially inimical to the effective and fair administration of the criminal law.'" *Abney v. United States*, 431 U.S. 651, 657, 97 S. Ct. 2034, 2039, 52 L.Ed.2d 651 (1977) (quoting *DiBella v. United States*, 369 U.S. 121, 126, 82 S. Ct. 654, 658, 7 L.Ed.2d 614 (1962)).

Midland Asphalt, 840 F.2d at 1042. This case does not fall within the limited class of exceptions to the rule of

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[3] The court assumed such violations *arguendo*. *Friedman*, 854 F.2d at 582.

finality in criminal cases which have been accorded judicial recognition, *see id.*, and we would not be justified in creating a further exception.

With respect to the Helmsleys' request for a hearing concerning the allegations of prosecutorial misconduct, we note that the Department of Justice is investigating the matter, and that Judge Walker has ordered that he be furnished with both a status report concerning that investigation and "a complete report of the investigation detailing the scope of the investigation, the findings and its conclusions." We agree with that procedure, and our dismissal of this interlocutory appeal is not to be considered a condonation of any prosecutorial misconduct that may have occurred,[4] an indication that it should be considered lightly, or a preclusion of any remedy that may appear appropriate upon completion of the investigation.

In the alternative, defendants request that if their appeal is dismissed, we treat the current application as a petition for a writ of mandamus. We are authorized to do so. *See Seguros Banvenez, S.A. v. S/S Oliver Drescher*, 715 F.2d 54, 56 n.1 (2d Cir. 1983); *Hartland v. Alaska Airlines*, 544 F.2d 992, 1001 (9th Cir. 1976). Mandamus is, however, an extraordinary remedy, which shall not issue absent compelling reasons of usurpation of power, clear abuse of discretion or an issue of first im-

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[4] We note in this connection Judge Lasker's statement, in his endorsement order denying pre-indictment relief, *see supra* note 1, that "[l]eaks of pending indictments have become so commonplace as to make a mockery of the secrecy provisions of the grand jury," and Judge Walker's comment, during the hearing on the motion whose denial is the subject of this appeal, that "it appears to me that this case was rife with Rule 6 violations." The indictment resulted from a joint investigation by federal and state authorities, and it is clear from the record that some information was supplied to the press by state, rather than federal, authorities. Numerous other press reports were attributed to anonymous law enforcement sources.

pression. *United States v. Coonan*, 839 F.2d 886, 889 (2d Cir. 1988). As noted above, the primary issue currently raised by defendants-appellants has already been decided by this court. Having determined that post-trial review is available to remedy any prejudice defendants-appellants may suffer, the application for mandamus must be denied.

The appeal is dismissed for want of appellate jurisdiction; mandamus is denied.